

1-1-1996

## Israel, Iran and Preemption: Choosing the Least Unattractive Option Under International Law

Louis Rene Beres

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>



Part of the [International Law Commons](#)

---

### Recommended Citation

Beres, Louis Rene (1996) "Israel, Iran and Preemption: Choosing the Least Unattractive Option Under International Law," *Penn State International Law Review*: Vol. 14: No. 2, Article 2.

Available at: <http://elibrary.law.psu.edu/psilr/vol14/iss2/2>

This Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact [ram6023@psu.edu](mailto:ram6023@psu.edu).

## ARTICLES

# Israel, Iran and Preemption: Choosing the Least Unattractive Option Under International Law

Louis René Beres\*

### I. Introduction

“Just wars,” according to Grotius, “arise from our love of the innocent.”<sup>1</sup> Recognizing this, the State of Israel — now facing the growing threat of unconventional aggression<sup>2</sup> from Iran<sup>3</sup> — may

---

\* Ph.D. Princeton (1971); Professor of International Law at Purdue University.

1. See HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 70 (William Whewell trans., 1853) (1625). Grotius is generally recognized as the founder of modern international law.

2. For the crime of aggression, see *Resolution on the Definition of Aggression*, Dec. 14, 1974, G.A. Res. 3314 (XXIX), 29 U.N. GAOR, Supp. No. 31, at 142, U.N. Doc. A/9631 (1975), reprinted in 13 I.L.M. 710 (1974). For pertinent codifications of the criminalization of aggression, see also the Kellogg-Briand Peace Pact, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 U.N.T.S. 57; U.N. CHARTER art. 2, ¶ 4; 1965 *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131 (XX), 20 U.N. GAOR, Supp. No. 14, at 11, U.N. Doc. A/6014 (1966), reprinted in 5 I.L.M. 374 (1966); 1970 *U.N. General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971); 1972 *Declaration on the Non-use of Force in International Relations and Permanent Prohibition on the Use of Nuclear Weapons*, G.A. Res. 2936, 27 U.N.

soon have to consider exercising the preemption option.<sup>4</sup> This option, founded upon the imperative to protect its innocent civilian populations from new forms of genocide,<sup>5</sup> could surely meet the test of a "just war."<sup>6</sup>

---

GAOR, Supp. No. 30, at 5, U.N. Doc. A/8730 (1972); Charter of the International Military Tribunal, annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279; *Resolution Affirming the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95 (1), 1 U.N. GAOR, U.N. Doc. A/236 (1946). See also Convention on the Rights and Duties of States, Dec. 26, 1933, arts. 8, 10-11, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19; Pact of the League of Arab States, Mar. 22, 1945, art. 5, 70 U.N.T.S. 237; Charter of the Organization of American States, Apr. 30, 1948, chs. II, IV, V, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3; Protocol of Amendment, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 [hereinafter Protocol of Buenos Aires]; Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, 121 U.N.T.S. 77 [hereinafter Rio Pact]; American Treaty on Pacific Settlement, Apr. 30, 1948, 30 U.N.T.S. 55 [hereinafter Pact of Bogota]; Charter of the Organization of African Unity, May 25, 1963, arts. II, III, 479 U.N.T.S. 39.

3. See, e.g., Yedidya Atlas, *Iran — An Islamic Threat*, MIDSTREAM, 1992, at 2-7; Louis René Beres, *Blind Confidence*, THE JERUSALEM REP., at 54 ("View-point"); Louis René Beres, *The Real Bases of Middle East Instability*, MIDSTREAM, June-July 1992, at 9-10; Louis René Beres, *Israeli Security and Self-Reliance after the Cold War: Geopolitical Imperatives, Strategic Considerations and Tactical Options*, Speech at Security Regimes: Israel and its Neighbors, Bar-Ilan Center for Strategic Studies (1992).

4. Preemption, of course, has figured importantly in prior Israeli strategic calculations. This is especially apparent in the wars of 1956 and 1967, and in the destruction of the Iraqi nuclear reactor in 1981. Significantly, it was the failure to preempt in October 1973 that contributed to heavy Israeli losses on the Egyptian and Syrian fronts during the Yom Kippur War, and—indeed—almost brought about Israeli defeat.

5. War and genocide are not mutually exclusive. War might well be the means whereby genocide is undertaken. According to Articles II and III of the Genocide Convention, which entered into force on January 12, 1951, genocide includes any of several acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such . . ." See Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277. It follows that where Israel is recognized as the institutionalized expression of the Jewish People (an expression that includes national, ethnical, racial and religious components), acts of war intended to destroy the Jewish State could assuredly be genocidal. Regarding such intentions, much of the current Islamic world, Iran in particular, seeks Israel's forcible destruction. In the words of Islamic Jihad, the Iranian-backed terrorist group claiming responsibility for the March 1992 bombing of the Israeli Embassy in Buenos Aires: "The war is open until Israel ceases to exist and until the last JEW in the world is eliminated . . . Israel is all evil and should be wiped out of existence." Nadim Ladki, *Islamic Jihad Vows More Attacks on Israel*, Mar. 23, 1992, available in LEXIS, Nexis Library, Current File (emphasis added).

6. In terms of international law, such a war would exhibit the characteristics of *anticipatory self defense*. For jurisprudential clarification by this author of this

## II. The Danger from Iran

Israel faces substantial danger of unconventional attack from Iran. In a few short years, or sooner, this danger could include nuclear attack. The sources of this danger lie in the Teheran regime's development of chemical, biological and nuclear weapons<sup>7</sup> and in its fundamentally theological/political commitment to destruction of the Jewish State. This congruence of capabilities and intentions portends a uniquely major war in the Middle East.

In addition to its ongoing purchase of nuclear infrastructure from China, North Korea and Russia, Iran has an ambitious, indigenous nuclear program. Centered at ten widely dispersed sites,<sup>8</sup> this program begins at Tabriz, in the north, continues through the large installation at Isfahan, and concludes in the nuclear facility at Busheir on the Persian Gulf. Named the "Death Program" by Iran, it receives much of its direction from Pakistan.<sup>9</sup> According to the distinguished Israeli observer Arie Stav: "Abdel

---

concept, with particular reference to Israel, see Louis René Beres, *After the Gulf War: Israel, Preemption and Anticipatory Self-Defense*, 13 HOUS. J. INT'L L. 259-80 (1991); Louis René Beres, *Striking 'First': Israel's Post Gulf War Options Under International Law*, 14 LOY. L.A. INT'L & COMP. L.J. 1-24 (1991); Louis René Beres, *Israel and Anticipatory Self-Defense*, 8 ARIZ. J. INT'L & COMP. L. 89-99 (1991); Louis René Beres, *After the Scud Attacks: Israel, 'Palestine,' and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 71-104 (1992). For an examination of assassination as a permissible form of anticipatory self-defense by Israel, see Louis René Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321-340 (1991).

7. See, e.g., the discussion of Iran and weapons of mass destruction in *The Threat of North Korean Nuclear Proliferation: Hearings Before Comm. on Foreign Affairs and Subcomm. on East Asia and Pacific Affairs*, 102nd Cong., 1st & 2nd Sess. (1991) (testimony of Gary Milhollin, Director, Wisc. Proj. on Arms Control); HOUSE REP. RES. COMM. TASK FORCE ON TERR. AND UNCONVEN. WARFARE, *IRAN'S STRATEGY AND NUCLEAR CAPABILITIES*, at 12 (1992); HOUSE REP. RES. COMM. TASK FORCE ON TERR. AND UNCONVEN. WARFARE, *IRAN'S NUCLEAR WEAPONS-UPDATE II*, at 5 (1992); DARREN H. DONNELLY & ZACHARY S. DAVIS, *IRAN'S NUCLEAR ACTIVITIES AND THE CONGRESSIONAL RESPONSE* 13, CRS Issue Brief (Library of Congress, 1992); SENATE COMM. ON GOV'T. AFF., 4 PROLIFERATION WATCH, No. 3, No. 5 (1993); ANTHONY H. CORDESMAN, *AFTER THE STORM: THE CHANGING MILITARY BALANCE IN THE MIDDLE EAST* 416-27 (1993); GERALD M. STEINBERG, *ARMS CONTROL AND ISRAELI NATIONAL SECURITY: A REALISTIC APPROACH* (1993); Doyle McManus, *The New, Dangerous Dominoes*, L.A. TIMES, May 8, 1994, at A14; Kenneth R. Timmerman, *Iran: Ever More Threatening*, 1 NAT'L SEC. Q. 30-33 (1993); *Weapons of Mass Destruction: The Cases of Iran, Syria and Libya*, MEDNEWS, Aug. 1992.

8. A tactical problem for Israel from the standpoint of preemption.

9. See ARIE STAV, 6 *THE ESCALATION OF THE ARMS RACE IN THE MIDDLE EAST: ON THE THRESHOLD OF CRITICAL MASS* 17 (1992).

Kader Khan, responsible for the development of the Pakistani Bomb, is chief adviser to the Iranian Nuclear Energy Commission, and Iranian technicians receive their training in Islamabad."<sup>10</sup> To a considerable extent, the problem lies in *religion*.

Theologically, any sort of peace settlement with Israel is seen as an intolerable affront to Islam and a negation of Iran's Islamic identity.<sup>11</sup> As for territorial compromise over "Palestine," this, too, is out of the question. Because a Muslim land in the heart of *dar al-Islam*<sup>12</sup> can be ruled properly only by Muslim authority, Israel's "usurpation" of *any* Arab land must be met with *jihad*.<sup>13</sup> Described by the current Islamic regime in Teheran as a poisonous growth in the Middle East, Israel is approached as a malignancy, not because of its particular policies, but because it is a Jewish state. Short of ceasing to exist, there is absolutely nothing Israel can do to achieve peace with Iran.

To implement its genocidal strategy against Israel, Iran is already at war with the Jewish State. This war is in the form of an insurgency utilizing the Hezbollah terrorist organization in the Bekaa.<sup>14</sup> Representing the active terror arm of Iran, Hezbollah is an extremist Islamic force animated exclusively by the path of armed struggle.

---

10. *Id.*

11. *Id.*

12. The *dar al-Islam*, the abode of Islam, is discussed in great detail in ROBERT S. WISTRICH, *ANTISEMITISM: THE LONGEST HATRED* 222-305 (1991). Here it is essential to understand that Iran's hatred of Israel derives from alleged and irremediable historical misdeeds of Jews against Islam, the revival of the blood libel by Muslims, Islamic denunciations of the Talmud and the carefully contrived demonic image of a ruthless, oppressive Jewish State. Promulgated by fundamentalist terror groups such as Hamas and Islamic Jihad, this hatred makes no distinctions between Jews, Judaism, and Israel. All are seen, as Wistrich points out, "as part of a global conspiracy to create an alien body in the heart of the Muslim world . . ." *Id.* at 223.

13. *Jihad*, or holy war, is discussed widely in WISTRICH, *supra* note 12, at ch.16. For fundamentalist Muslims, Wistrich points out, "... peace with Israel was and still remains nothing less than a poison threatening the life-blood of Islam, a symptom of its profound malaise, weakness and decadence." *Id.* at 227. According to Islamic orthodoxy, the Prophet is said to have predicted a final war to annihilate the Jews. See ARAB THEOLOGIANS ON JEWS AND ISRAEL: EXTRACTS FROM THE PROCEEDINGS OF THE FOURTH CONFERENCE OF THE ACADEMY OF ISLAMIC RESEARCH 9 (D.F. Green ed., 1976). Mohammed, it is reported, had stated: "The hour (i.e., salvation) will not come until you fight against the Jews; and the stone would say 'O Muslim! There is a Jew behind me: come and kill him,'" *Id.* at 51; WISTRICH, *supra* note 12, at 230.

14. In this part of Lebanon, Islamic terror groups, aided by Syria and Iran, exert constant military pressure on Israel's northern borders.

Iran is also behind the marked escalation of Hamas terrorism against Israeli targets. Although, historically Iran has favored the Palestinian Islamic Jihad, a staunchly pro-Shiite organization, a distinct tilt toward Hamas took place after the 1991 Gulf War. Moreover, Hamas has been exploring new avenues of cooperation with Hezbollah, with the latter now establishing a Hamas liaison office in southern Lebanon.

For Iran, however, terrorist attacks upon Israel are only the opening salvo of a much greater war, a "softening" strategy that weakens the Jewish State for subsequent direct assault. Such assaults, if Iran is left unchecked, could exhibit chemical, biological or even nuclear forms of aggression. Because massive and unconventional first-strikes against Israel could prevent an unacceptably damaging reprisal, Israel may have little choice but to strike first in its own essential defense.

### III. Strategic and Tactical Considerations of an Israeli Preemption

But would preemption by Israel be strategically and tactically cost effective? This, of course, would depend upon a number of critical variables, including: (a) expected probability of Iranian first-strikes; (b) expected disutility of Iranian first-strikes;<sup>15</sup> (c) expected schedule of Iranian unconventional weapons deployment; (d) expected efficiency of Iranian active defenses over time;<sup>16</sup> (e) expected efficiency of Israeli active defenses over time; (f) expected efficiency of Israeli hard-target counterforce operations over time;

---

15. On Israel's nuclear weapons see generally, SHLOMO ARONSON, *THE POLITICS AND STRATEGY OF NUCLEAR WEAPONS IN THE MIDDLE EAST: OPACITY, THEORY AND REALITY, 1960-1991* (1992); FRANK BARNABY, *THE INVISIBLE BOMB: THE NUCLEAR ARMS RACE IN THE MIDDLE EAST* (1989); LOUIS RENÉ BERES, *SECURITY OR ARMAGEDDON: ISRAEL'S NUCLEAR STRATEGY* (1986); MCGEORGE BUNDY, *DANGER AND SURVIVAL: CHOICES ABOUT THE BOMB IN THE FIRST FIFTY YEARS* (1988); YAIR EVRON, *ISRAEL'S NUCLEAR DILEMMA* (Hakibbutz Hameuchad ed., 1987); SEYMOUR M. HERSCH, *THE SAMSON OPTION: ISRAEL'S NUCLEAR ARSENAL AND AMERICAN FOREIGN POLICY* (1991); TAYSIR NASHIF, *NUCLEAR WARFARE IN THE MIDDLE EAST: DIMENSIONS AND RESPONSIBILITIES* (1984); PIERRE PEAN, *LES DEUX BOMBES* (1982); LEONARD S. SPECTOR, *THE UNDECLARED BOMB* (1988).

16. Israeli judgments concerning preemption must take into account, *inter alia*, Iranian anti-tactical ballistic missile (ATBM) developments. If, for example, such developments should permit Iran to intercept a pertinent fraction of Israeli offensive missiles, Israel's cost-benefit calculations on preemption could be transformed significantly. Correspondingly, should Israel's own ATBM developments suggest optimism about interception reliability, the cost-effectiveness of an Israeli preemption would likely be enhanced.

- (g) expected reactions of other regional enemies (e.g., Syria); and
- (h) expected world community reactions to Israeli preemptions.<sup>17</sup>

Reduced to its essential dimensions, Israel's dilemma is this: Should it plan for anticipatory self-defense<sup>18</sup> attacks against Iranian unconventional forces at all,<sup>19</sup> and, if it should, precisely *when* should these attacks be mounted? Where it is assumed that Iran will only be adding to its chemical, biological and nuclear arsenals, and that these additions will make effective Israeli preemptions more and more problematic? Rational strategy would seem to compel Jerusalem to act defensively *as soon as possible*.<sup>20</sup>

17. The expected world community reactions to an Israeli preemption against Iran could play a major role in Jerusalem's decisional calculations. If, after all, these reactions would likely be very hostile — as indeed, they are apt to be in the midst of a so-called "Peace Process" — Israel would have some good reason not to preempt. This is especially the case with regard to probable negative reactions from Washington, as Israel depends so heavily upon American support and security guarantees.

18. See also, HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY (1604):

Now, as Cicero explains, this [justification for preemption] exists whenever he who chooses to wait [for formal declarations] will be obliged to pay an unjust penalty before he can exact a just penalty; and, in a general sense, it exists whenever matters do not admit of delay. Thus it is obvious that a just war can be waged in return, without recourse to judicial procedure, against an opponent who has begun an unjust war; nor will any declaration of that just war be required . . . . For—as Aelian says, citing Plato as his authority—any war undertaken for the necessary repulsion of injury, is proclaimed not by a crier nor by a herald but by the voice of Nature herself.

See HUGO GROTIUS, DE IURE PRAEDAE COMMENTARIUS 96 (James Brown Scott ed. & Gladys L. Williams & Walter H. Zeydel tran., Oceana Publications 1964).

19. The customary right of anticipatory self-defense has its modern origins in the *Caroline* incident, which concerned the unsuccessful rebellion of 1837 in Upper Canada against British rule (a rebellion that aroused sympathy and support in the United States). See Beth M. Polebaum, *National Self Defense in International Law: An Emerging Standard For a Nuclear Age*, 59 N.Y.U. L. REV. 187, 190-91 (1984) (noting that the *Caroline* case transformed the right to self-defense from an excuse for armed intervention into a legal doctrine). Following this incident, the serious threat of armed attack has generally justified militarily defensive action. In an exchange of diplomatic notes between the governments of the United States and Great Britain, then United States Secretary of State Daniel Webster outlined a framework for self-defense that did not require an actual attack. See *id.* at 191; R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938). Here the framework permitted military response to a threat so long as the danger posed was "instant, overwhelming, leaving no choice of means and no moment for deliberation." See *id.*; 61 PARLIAMENTARY PAPERS (1843), reprinted in Jennings, *supra*, at 89.

20. This is because any undue delay could impair Israel's tactical capacity for preemptive action. What this means is that incremental Iranian dispersion of unconventional weapons assets would make it progressively more difficult for

If, however, it is assumed that there will be no significant enlargement or deployment of Iranian unconventional weapons over time, this *may* suggest a diminished rationale for Israel to strike first. Critical considerations here would include Israeli assumptions about Iranian rationality, expectations about costs to Israel of Iranian aggression in the near term;<sup>21</sup> comparisons of costs to Israel of Iranian near-term aggression with those of Iranian reprisals to Israeli preemption;<sup>22</sup> and projected efficacy over time of Israeli and Iranian ATBM operations.<sup>23</sup>

More than any other factor, *expected* rationality of Iranian decision-makers will figure in Israeli judgments on the preemption option. If, after all, these leaders were expected to strike at Israel with unconventional forces irrespective of anticipated Israeli counterstrikes, deterrence, by definition, would be immobilized. This means that Iranian strikes could be expected even if Iran understood that Israel had "successfully" deployed its own nuclear weapons in altogether survivable modes, that Israel's weapons were

---

Israel to destroy pertinent targets without incurring unacceptable risks of chemical/biological/nuclear retaliation. It is conceivable, of course, that Israel's preemption window of opportunity is *already* closed. If this is the case, Israel's only remaining security hopes are contingent upon successful deterrence and upon the absence of irrational decision-makers in Teheran.

21. These expectations refer to particular harms predicted to accrue to Israel from Iranian aggression in the next several years. If such harms were predictably "low," Israel's incentive to preempt would likely also be "low." If, however, such harms were predictably "high," Israel's preemption imperative would likely be correspondingly "high."

22. Should Israel decide to preempt Iranian attacks with conventional strikes, Teheran's response would largely determine Jerusalem's next moves. If this response were in any way nuclear, Israel would assuredly resort to nuclear counterretaliation. If this retaliation were to involve chemical and/or biological weapons, Israel might also feel pressed to take the escalatory initiative. Should the Iranian response to Israel's nonnuclear preemption be limited to hard-target conventional strikes, it is most unlikely that the Jewish State would move on to nuclear counterretaliations. If, however, the Iranian conventional retaliation were all-out and directed toward civilian populations as well as to military targets, an Israeli nuclear counterretaliation could not be ruled out. It would appear that such a counterretaliation could be ruled out only if the enemy conventional retaliation were entirely proportionate to Israel's preemption, confined exclusively to Israeli hard targets, circumscribed by the legal limitations of military necessity and accompanied by explicit/validated assurances of nonescalatory intent.

23. This refers to *comparative* expectations concerning capacity to intercept incoming ballistic missiles. Moreover, such comparisons of efficacy must be projected *over time*, as Israeli judgments could be affected by differential and incremental development of ATBM operations. For example, if Israel expected Iranian ATBM capabilities to increase more rapidly than its own ATBM capabilities, this could *enhance* Israel's incentive to preempt.



altogether capable of penetrating Iranian active defenses, and that Israel's leaders were altogether willing to retaliate.<sup>24</sup>

#### IV. The Problem of Reliance Upon Nuclear Deterrence

To fully understand the risks of Israeli reliance upon nuclear weapons for deterrence, one must first understand the inherent logic of that method of producing national security. To deter enemy attack, in this case by Iran, Israel must be able to prevent that enemy, by threat of an unacceptably damaging reprisal, from deciding to strike.<sup>25</sup> Here, security would be sought by convincing the prospective attacker that the costs of a considered attack will exceed the expected benefits. Assuming that Israel's enemies (1) always value self-preservation more highly than any other preference or combination of preferences; and (2) always choose rationally between alternative options, they *will*, barring accidental or unauthorized firings, always refrain from attacking an Israel that is believed willing and able to deliver an appropriately destructive response.

Two factors must communicate such a belief. First, in terms of *ability*, there are two essential components: *payload* and *delivery system*. It must be successfully communicated to the prospective attacker by Israel that the Jewish State's firepower, and the means of delivering that firepower, are capable of wreaking unacceptable levels of retaliatory destruction after a first-strike attack. This means that Israel's retaliatory forces must *appear* sufficiently *invulnerable* and sufficiently elusive to *penetrate* the prospective attacker's active and civil defenses. It need not be communicated to the potential attacker that such firepower and/or the means of delivery are *superior*. The capacity to deter need not be as great as the capacity to win.

The second factor of communication for Israel is *willingness*. How may Israel convince potential attackers that it possesses the

---

24. The perceived willingness to retaliate is ordinarily essential to credible deterrence. Hence, if Israel were to face only rational adversaries, their perception of substantially invulnerable Israeli retaliatory (including nuclear) forces and of Israeli decision-makers *willing* to unleash these forces, would deter them from striking first. If, however, Israel were to face *irrational* adversaries, such as might possibly be expected in Iran, even such perceptions of Israeli force invulnerability and decisional willingness could fail to deter.

25. This is the very essence of nuclear deterrence. For more on such deterrence in general, and in regard to Israel in particular, see LOUIS RENÉ BERES, *APOCALYPSE: NUCLEAR CATASTROPHE IN WORLD POLITICS* (1980); BERES, *supra* note 15.

resolve to deliver an unacceptably destructive retaliation? The answer to this question lies, in part, in the demonstrated strength of the commitment to carry out the threat. Israel can enhance the credibility of its threat by committing itself in advance to threat fulfillment.

Here, a number of possibilities come immediately to mind. One such possibility would involve the announcement of an automatic system of nuclear reprisal, a firing procedure whereupon computerized measures of particular thresholds of destruction suffered by Israel would generate, without direct human intervention, predetermined levels of nuclear retaliation. Such a "dooms-day device," however, would carry with it enormous and intolerable risks of computer or mechanical failure and associated risks of enemy first-strikes. It does not warrant serious consideration.

Another more plausible and promising possibility could involve open announcement of nuclear capability, a shift away from "deliberate ambiguity" that would identify distinctly "usable" forces.<sup>26</sup> With such an announcement, a prospective attacker, newly aware that Israel could retaliate without generating intolerably high levels of civilian harms<sup>27</sup> would be more likely to believe Israel's nuclear threats.

Significantly, taking the bomb out of the "basement"<sup>28</sup> would also strengthen the *ability* component of Israel's nuclear deterrence. Operational benefits of disclosure would probably accrue from deliberately-released information about dispersion, multiplication and hardening of nuclear weapon systems and about certain other pertinent technical features of Israel's nuclear weapon systems.<sup>29</sup> By removing doubts about Israel's nuclear force capabilities, an end to deliberate ambiguity could enhance Israeli nuclear deterrence.

---

26. See BERES, *supra* note 15 and accompanying text.

27. See Thomas W. Dowler & Joseph S. Howard II, *Countering the Threat of the Well-Armed Tyrant: A Modest Proposal for Small Nuclear Weapons*, 19 STRATEGIC REV. 34-40 (1991).

28. One way Israel might actually remove the bomb from the basement would involve open testing of nuclear weapons. Significantly, in the aftermath of the Cold War and the pre-Gulf War indifference of the United States to Iraqi and Pakistani nuclearization, such testing might well be at minimal political cost. Within the government of Israel, the policy of "deliberate ambiguity" was first questioned after the Yom Kippur War, in 1976, when Moshe Dayan called for the deployment of an overt nuclear force. See generally Louis René Beres, *Israel's Bomb in the Basement: A Second Look*, ISRAEL AFF. (1996).

29. *Id.*

Strictly speaking, removing the bomb from the Israeli basement<sup>30</sup> would not constitute an irrevocable advance commitment to threat fulfillment.<sup>31</sup> After all, it is entirely conceivable that an "announced" bomb would still not be used and that the shift from deliberate ambiguity would be little more than an elaborate bluff. Nevertheless, it is altogether likely that such a shift would reflect a genuine sense of strategic urgency in Israel, and that Israel's adversaries, especially Iran, would judge it accordingly.<sup>32</sup>

These, then, are the basic features of "deadly logic," the system of security through deterrence upon which Israel may choose to depend. It is, however, a system that should provide little cause for complaisance in Jerusalem because the ingredients of a credible nuclear deterrence posture are extraordinarily complex and problematic.

A nuclear weapons capability, defined to include nuclear explosives, associated delivery vehicles, and supporting infrastructure, does not necessarily imply a credible deterrence posture.<sup>33</sup> In fact, there exists no automatic connection between the two. In spite of the enormous devastation that nuclear weapons are capable of inflicting, threats of their retaliatory use will not always be believed.<sup>34</sup> The persuasiveness of a retaliatory threat rests not only upon the anticipated level of destruction, but also on the perceived willingness or resolve to carry it out.<sup>35</sup> Such willingness, as just seen, may not always be a feature of Israel's nuclear threat.

Another problem of Israeli reliance upon nuclear deterrence concerns the appearance of secure retaliatory forces. A secure Israeli retaliatory force is an essential precondition of "assured destruction."<sup>36</sup> Yet, there is no reason to believe that a would-be

---

30. The question of the "bomb in the basement" is examined exhaustively in Beres, *supra* note 28, at 242.

31. This means that such removal would not amount ipso facto to improved nuclear deterrence. See *supra* note 28 and accompanying text.

32. Whether or not a shift from ambiguity to disclosure would actually enhance Israeli deterrence, would also depend on several other complex factors, including the types of weapons involved, the reciprocal calculations of Iranian leaders, the effects upon rational decision-making processes by these leaders and the effects on both Israeli and Iranian command, control and communications operations. If, for example, bringing Israel's bomb in the basement out into the light were to result in Iranian predelegations of launch authority and/or new launch-on-warning procedures, the likelihood of unauthorized and/or accidental wars, including in the future, nuclear wars could be increased.

33. See generally Beres, *supra* note 28 and accompanying text.

34. *Id.*

35. *Id.*

36. *Id.*

attacker will always be prepared to make such a judgment.<sup>37</sup> Significantly, however accurate or inaccurate the attacker's judgment turns out to be regarding the vulnerability of Israel's retaliatory forces, the decision to attack would signify the failure of Israeli deterrence.<sup>38</sup> Here, Israel's deterrent would prove unsuccessful even though the Jewish State had actually possessed a secure nuclear weapons capability.

A more immediate problem, of course, is that this capability might not be sustainable. Because of its notably small size, Israel might not be able to secure its nuclear forces within the limited parameters of the country's green lines.<sup>39</sup> Recognizing this, Israel is apt to explore all available opportunities for sea-basing a portion of its nuclear deterrent forces.<sup>40</sup> But even such prudent efforts at strengthening deterrence will not safeguard Israel from enemies that do not conform to the rules of rationality in world politics.<sup>41</sup> Faced with such enemies, Jerusalem's deterrence logic would, by definition, be immobilized, leaving few reasonable alternatives to prompt preemption against menacing hard targets. If Israel's enemies cannot be deterred then preemption may be the only alternative to being attacked.

Faced with an irrational adversary in Iran, Israel would have no choice but to abandon reliance on traditional models of nuclear deterrence.<sup>42</sup> Here, preemption would become obligatory;<sup>43</sup> the

---

37. *Id.*

38. Beres, *supra* note 28 and accompanying text.

39. The green lines refer to Israel's pre-June 5, 1967, eastern border delineated in the armistice agreements with Syria and Jordan, and its southern border with the Gaza Strip in the armistice agreement with Egypt in the aftermath of the War of Independence. The border line was colored green on the original maps drawn up at Rhodes. *See generally id.*

40. This is because nuclear weapons deployed at sea provide significant opportunities for more secure basing and reduced vulnerability. *Id.*

41. Deterrence depends always on the assumption of rationality. *Id.*

42. In considering the operation of nuclear deterrence and associated matters of nuclear strategy, including preemption, it is vital to recall that such operation impacts and determines the adequacy of pertinent international law. For example, the adequacy of international law in preventing nuclear war in the Middle East will depend not only upon certain treaties, customs and general principles, but also upon the success or failure of particular country strategies in the region. If Israeli strategy should reduce the threat of nuclear war, either because of successful forms of nuclear deterrence or because of essential nonnuclear preemptive strikes, such strategy must be considered an essential component of international law. *Id.*

43. Such preemptions would almost certainly be undertaken with conventional (i.e., nonnuclear) weapons. It is extremely improbable that Israel would ever decide to launch a preemptive nuclear strike. Although circumstances could arise wherein such a strike would be perfectly rational, it is (hopefully) implausible that

only questions would center on matters of timing, targeting, and configuration of ordnance. Needless to say, the initial judgment concerning Iranian definitions of "unacceptable damage"<sup>44</sup> would have to be made with great care. There is no room for error on this judgment.

## V. Preemption and International Law

Let Israel heed no "expert opinion" that such preemptive attacks would be in violation of international law. International law is not a suicide pact!<sup>45</sup> Today, especially, in an age of unique-

---

Israel would allow itself to reach these dire circumstances. Moreover, unless the nuclear weapons involved were used in a fashion consistent with the authoritative norms of the laws of war, this form of preemption would clearly represent an egregious violation of international law. And even if such consistency were possible, the psychological and political impact on the world community would be uniformly negative and far-reaching. It follows that an Israeli nuclear preemption could be expected only: (a) where Iran had acquired nuclear and/or other unconventional weapons judged capable of destroying the Third Temple; (b) where Iran had made clear that its intentions paralleled its capabilities; (c) where Iran were believed ready to begin a "countdown to launch," and (d) where Jerusalem believed that Israeli nonnuclear preemptions could not achieve needed minimum levels of damage-limitation (i.e., levels consistent with preservation of the Third Temple). *Id.*

44. Such definitions will be critical to successful deterrence. Beres, *supra* note 28 and accompanying text.

45. Let us recall here Pufendorf's argument in ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW:

... where it is quite clear that the other is already planning an attack upon me, even though he has not yet fully revealed his intentions, it will be permitted at once to begin forcible self-defense, and to anticipate him who is preparing mischief, provided there be no hope that, when admonished in a friendly spirit, he may put off his hostile temper; or if such admonition be likely to injure our cause. Hence, he is to be regarded as the aggressor, who first conceived the wish to injure, and prepared himself to carry it out. But the excuse of self-defense will be his, who by quickness shall overpower his slower assailant. And for defense, it is not required that one receive the first blow, or merely avoid and parry those aimed at him.

See 2 SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 32 (Frank Gardner Moore trans., 1964).

ly catastrophic weaponry,<sup>46</sup> the law of nations<sup>47</sup> does not require

---

46. There now exists a huge literature dealing with such weaponry and with the expected consequences of a nuclear war. For works on these consequences by this author, see BERES, *supra* note 25 and accompanying text; MIMICKING SISYPHUS: AMERICA'S COUNTERVAILING NUCLEAR STRATEGY (1983); REASON AND REALPOLITIK: U.S. FOREIGN POLICY AND WORLD ORDER (1984); BERES, *supra* note 15 and accompanying text.

47. On the "nuclear regime" under international law, including the anti-proliferation measures, see *Antarctic Treaty*, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71; *The Memorandum of Understanding Between the United States and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communication Link*, June 20, 1963, 14 U.S.T. 825, T.I.A.S. No. 5362, 472 U.N.T.S. 163 [hereinafter *Hot Line Agreement*]; *The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*, Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 [hereinafter *Partial Test Ban Treaty*]; *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, opened for signature Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 [hereinafter *Outer Space Treaty*]; *Treaty for the Prohibition of Nuclear Weapons in Latin America*, Feb. 14, 1967, 634 U.N.T.S. 326 [hereinafter *Treaty of Tlateloco*]; *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 [hereinafter *NPT*]; *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof*, opened for signature Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337, 955 U.N.T.S. 115 [hereinafter *Seabed Arms Control Treaty*]; *Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War*, Sept. 30, 1971, U.S.-U.S.S.R., 22 U.S.T. 1590, T.I.A.S. No. 7186, 807 U.N.T.S. 57 [hereinafter *Accident Measures Agreement*]; *Agreement on Measures to Improve the USA-USSR Direct Communications Link*, U.S.-U.S.S.R., Sept. 30, 1971, 22 U.S.T. 1598, T.I.A.S. No. 7187, 806 U.N.T.S. 402 [hereinafter *Modernization Agreement*]; *Treaty on the Limitations of Anti-Ballistic Missile Systems*, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503, 944 U.N.T.S. 13 [hereinafter *ABM Treaty*]; *Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms*, May 26, 1972, 23 U.S.T. 3462, T.I.A.S. No. 7504, 94 U.N.T.S. 3; *Declaration of Basic Principles of Relations Between the United States of America and the Union of Soviet Socialist Republics*, May 29, 1972, 66 DEPT. STATE BULL. 898; *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests*, July 12, 1974, 71 DEPT. STATE BULL. 217; *Limitation on Anti-Ballistic Missile Systems Treaty Protocol*, July 3, 1974, U.S.-U.S.S.R., 27 U.S.T. 1645, T.I.A.S. No. 8276; the *Joint Statement on the Limitation of Strategic Offensive Arms* [hereinafter *Vladivostok Agreement*], Apr. 29, 1974, 70 DEPT. STATE BULL. 677; *Final Act of the Conference on Security and Cooperation in Europe*, Aug., 1, 1975, DEPT. STATE PUB. NO. 8826 (Gen. Foreign Pol. Ser. 298) [hereinafter *Helsinki Accords*]; *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Report of the Committee on the Peaceful Uses of Outer Space*, 34 U.N. GAOR, Supp. (No. 20) 33, U.N. Doc. A/34/20 Annex II (1979) [hereinafter *the Moon Treaty*]; *South Pacific Nuclear-Free Zone Treaty*, Aug. 6, 1985, 24 I.L.M. 1440; *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles*, Dec. 8, 1987, 88 DEPT. STATE BULL. 24 (Feb. 1988) [hereinafter *INF Treaty*]. See also the U.S.-U.S.S.R. *Treaty and*

Israel to wait for its own annihilation.<sup>48</sup>

For many years, Israel has sought to survive by utilization of diplomatic remedies.<sup>49</sup> In January 1993, Israel became a charter signatory of the Chemical Weapons Convention (CWC), while Egypt, Syria and most other states in the area rejected the Treaty.<sup>50</sup> Israel ratified the Limited Test Ban Treaty in 1964.<sup>51</sup> It is a member of the International Atomic Energy Agency (IAEA) and has safeguard agreements for several minor facilities.<sup>52</sup> It has consistently supported the idea of a Nuclear Weapons Free Zone for the Middle East (MENWFZ),<sup>53</sup> and on September 13, 1993, it signed a formal peace agreement with the Palestine Liberation Organization.<sup>54</sup>

In 1987, the United States and six other industrialized states formed the Missile Technology Control Regime (MTCR).<sup>55</sup> Nevertheless, MTCR did nothing to prevent Iraq from upgrading its Scud-B missiles, with technology and assistance from such

*Protocol on Underground Nuclear Explosions for Peaceful Purposes*, May 28, 1976, 74 DEPT. STATE BULL. 802 (1976); *Treaty Between the United States of America and the Union of Soviet Socialist Republics*, the SALT II Treaty, June 18, 1979, S. EXEC. DOC. Y, 96th Cong., 1st Sess. 37 (1979).

48. For those who might seek even more specific guidance under international law, it can be argued persuasively that because a state of war exists between Israel and Iran (at Iran's insistence), the Jewish State does not even need to meet the requirements of anticipatory self-defense. Instead, as there can be no authentic "first strike" in an ongoing belligerency, an Israeli attack would need only to fulfill the expectations of the laws of war, i.e., the rules of discrimination, proportionality and military necessity. A legal state of war *can* exist between two states irrespective of the presence or absence of ongoing hostilities between national armed forces. The principle affirming that the existence of a legal state of war depends upon the *intentions* of one or more of the states involved, and not on "objective" phenomena, is known variously as the "state of war" doctrine, "*de jure* war," "war in the legal sense," and "war in the sense of international law."

49. See *infra* note 57-61 and accompanying text.

50. See Gerald M. Steinberg, *The History of Arms Control in the Middle East*, in *ARMS CONTROL WITHOUT GLASNOST: BUILDING CONFIDENCE IN THE MIDDLE EAST* 7-28 (Avi Beter ed., 1993).

51. *Id.*

52. *Id.*

53. *Id.*

54. This Agreement flows formally from the Madrid Process, which began with the U.S. — Soviet Letter of Invitation to the Peace Talks in Madrid of Oct. 18, 1992 and resulted in the Cairo Agreement of Feb. 9, 1994. From the standpoint of international law, the Oslo Agreement is *not* a treaty. According to the Vienna Convention on the Law of Treaties, a treaty I.C. is always an international agreement "concluded between States . . ." See U.N. DOC. A/CONF. 39/27, at 289 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969).

55. See Steinberg, *supra* note 50.

signatories as Germany, Great Britain, and the United States.<sup>56</sup> Moreover, as Gerald M. Steinberg points out, U.S. policies may already have impacted Israeli capabilities adversely:

In 1990, after the U.S. Congress enacted the Missile Technology Control Act, creating penalties for foreign firms that violate MTCR guidelines, the Bush administration's first target was not North Korea, Syria, Iran or Iraq, but Israel. Under the threat of sanctions, Israel has been forced to accept the terms of the MTCR with no comparable limits on the threat which Israel faces. Moreover, Israel has also been excluded from receiving any of the benefits that go with membership in the MTCR system. No sanctions were imposed on Germany and other Western European states that allowed shipments of missile technology to Iraq.<sup>57</sup>

A structural aspect of MTCR that is problematic for Israel is its definition of nuclear-capable missiles. The MTCR focuses narrowly on those missiles having a range of at least 300 km and a payload capability of at least 500 kg.<sup>58</sup> In the Middle East, however, enemy states are very close together, making shorter-range missiles strategically significant.

For Israel, arms control remedies are fraught with intolerable risk. Although the Jewish State is assuredly committed to the control of force through law,<sup>59</sup> it must temper this commitment with an overriding obligation to survive. No diplomatic agreement that would place the Third Temple<sup>60</sup> in jeopardy could conceivably be binding.<sup>61</sup> The overriding importance of survival under international law was even recognized by Thomas Jefferson.

---

56. *Id.*

57. See GERALD M. STEINBERG, *ARMS CONTROL AND ISRAELI NATIONAL SECURITY: A REALISTIC APPROACH* 8 (1993).

58. *Id.*

59. This is especially apparent since the implementation of the Oslo Accords.

60. In Jewish-historical terms, the "Third Temple" signifies the current State of Israel and the "End of the Third Temple" refers to the destruction of this current State. The First Jewish Temple, or commonwealth, was destroyed by the Babylonians (ancestors of present-day Iraqis) in 586 B.C. The Second Temple was destroyed by the Romans in the year 70 A.D.

61. A jurisprudential theory, following Hegelian ideas, is that any treaty obligation may be terminated unilaterally following changes in conditions that make performance of the treaty injurious to fundamental rights, especially the rights of existence, self-preservation and independence. These rights have been summarized in law as "rights of necessity." See ARIE E. DAVID, *THE STRATEGY OF TREATY TERMINATION* 19 (1975); LAW OF TREATIES, 29 AM. JUR. INT'L L. 666, 1100 (1935).



Thomas Jefferson, who was familiar with Epicurus, Cicero, and Seneca, as well as with Voltaire, Montesquieu, Holbach, Helvetius, and Beccaria, wrote as follows about limits to obligation under international law:

The Moral duties which exist between individual and individual in a state of nature, accompany them into a state of society and the aggregate of the duties of all the individuals composing the society constitutes the duties of that society towards any other, so that between society and society the same moral duties exist as did between the individuals composing them while in an unassociated state, their maker not having released them from those duties on their forming themselves into a nation. Compacts then between nation and nation are obligatory on them by the same moral law which obliges individuals to observe their compacts. There are circumstances however which sometimes excuse the non-performance of contracts between man and man; so are there also between nation and nation. When performance, for instance, becomes *impossible*, non-performance is not immoral. So if performance becomes *self-destructive* to the party, the law of self-preservation overrules the laws of obligation to others.<sup>62</sup>

*Pacta sunt servanda!* — States must comply in good faith with their treaty obligations. The problem with this peremptory<sup>63</sup> norm of international law is that it reflects altogether erroneous assumptions about cooperation and comity in world affairs. Such assumptions are especially erroneous in the Middle East.

The state of nations, within which international law operates, remains a state of nature. Since the end of the Thirty Years War

---

62. See Thomas Jefferson, *Opinion on the French Treaties*, in THE POLITICAL WRITINGS OF THOMAS JEFFERSON 113-14 (Merrill D. Peterson ed., 1993). Later, Jefferson concludes: "As every treaty ought to be made by a sufficient power, a treaty pernicious to the state is null, and not at all obligatory; no governor of a nation having power to engage things capable of *destroying* the state, for the safety of which the empire is trusted to him. The nation itself, bound necessarily to whatever its preservation and safety require, cannot enter into engagements contrary to its indispensable obligations." *Id.* at 115.

63. According to Article 53 of the Vienna Convention on the Law of Treaties, "... a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." See Article 53, *Vienna Convention on the Law of Treaties*, Vienna, May 22, 1969, opened for signature, May 23, 1969, U.N. Conference on the Law of Treaties, First and Second Sessions, Mar. 26-May 24 1968, and April 9-May 22, 1969, U.N. DOC. A/CONF. 39/27, at 289 (1969), reprinted in 8 I.L.M. 679 (1969).

and the resulting Peace of Westphalia in 1648, the states in world politics have coexisted uneasily without a specially-created world government.<sup>64</sup> As a result, each state, in the final analysis, continues to depend upon expressions of national power in order to survive. Without such expressions, which are at the heart of what is commonly known as *Realpolitik*,<sup>65</sup> weaker states can endure only at the pleasure of the strong.<sup>66</sup> For Israel, weakness could produce genocide.<sup>67</sup>

## VI. The Legacy of Osiraq

This understanding, that weakness could produce genocide, is not unprecedented for the Jewish State. On June 7, 1981, Israeli fighter-bombers destroyed Iraq's Osiraq nuclear reactor before it was ready to go "on line."<sup>68</sup> At that time, the global community reaction was overwhelmingly negative.<sup>69</sup> Even the U.N. Security Council, in Resolution 487 of June 19, 1981, indicated that it

64. See generally LOUIS RENÉ BERES, 1 PEOPLE, STATES AND WORLD ORDER (1981).

65. *Id.*

66. *Id.*

67. For writings by this author on the subject of genocide, see LOUIS RENÉ BERES, AMERICA OUTSIDE THE WORLD: THE COLLAPSE OF U.S. FOREIGN POLICY (1987); REASON AND REALPOLITIK: U.S. FOREIGN POLICY AND WORLD ORDER (1984); *After the Gulf War: Iraq, Genocide and International Law*, 69 U. DET. MERCY L. REV. 13 (1991); *Genocide and Genocide-Like Crimes*, in 1 INTERNATIONAL CRIMINAL LAW 271 (M. Cherif Bassiouni ed., 1986); *Genocide and Power Politics: The Individual and the State*, 18 BULL. OF PEACE PROPOSALS 73 (1987); *Genocide, Law and Power Politics*, 10 WHITTIER L. REV. 329 (1988); *Genocide, State and Self*, 18 DENV. J. INT'L L. & POL'Y 37 (1989); *International Law, Personhood and the Prevention of Genocide*, 11 LOY. L.A. L. REV. 25 (1989); *Justice and Realpolitik: International Law and the Prevention of Genocide*, 33 AM. J. JURIS. 123 (1988); *Reason and Realpolitik: International Law and the Prevention of Genocide*, 30 CHITT'YS L.J. 223 (1982); *Punishing Genocide and Crimes Against Humanity After the Gulf War: Iraqi Crimes and International Law* 41 (1992) (on file with the Graduate Institute of International Studies, Geneva).

68. For more information on this event, see GOVERNMENT OF ISRAEL, THE IRAQI NUCLEAR THREAT: WHY ISRAEL HAD TO ACT (1981); H. Grumm, 4 *Safeguards and Tammuz: Setting the Record Straight*, 23 IAEA BULL. 10-14 (1981); *Israeli Attack on Iraqi Nuclear Facilities: Hearings before Committee of Foreign Affairs, Subcommittee on International Security and Scientific Affairs, and Subcommittee on Europe and the Middle East*, 97th Cong., 1st Sess. 51-57 (1981) (testimony of Roger Richter, former inspector, IAEA); AMOS PERLMUTTER, TWO MINUTES OVER BAGHDAD (1982); Shai Feldman, *The Bombing of Osiraq Revisited*, 7 INT'L SEC. 114 (1982); Roger F. Pajak, *Nuclear Status and Policies of the Middle East Countries*, 59 INT'L AFF. 596 (1983).

69. See Louis René Beres & Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 TEMP. INT'L & COMP. L.J. 437-49 (1996).

"strongly condemns" the attack and that "Iraq is entitled to appropriate redress for the destruction it has suffered."<sup>70</sup>

Yet, Israel certainly did not act illegally at Osiraq. Its inherent right to anticipatory self-defense was especially compelling. Faced with mass destruction weapons in the hands of an enemy state, an unwillingness to preempt would have carried high risks of annihilation.<sup>71</sup> Thus, Israel did not commit aggression at Osiraq. Iraq has always insisted that a state of war exists with the "Zionist entity."<sup>72</sup> It follows that because aggression cannot be committed against a state with which a country is already at war, Jerusalem could not possibly have been guilty of such a "crime against peace."<sup>73</sup>

Israel did not violate international laws of war at Osiraq. Fourteen Israeli aircraft took part in the raid, eight F-16 Falcons, each carrying two 1000-kilogram bombs and six F-15 Eagles serving as escort planes.<sup>74</sup> The reactor was completely destroyed, without civilian casualties and before any radiation dangers existed.<sup>75</sup> Unlike Iraq's thirty-nine Scud attacks on Israel during the Gulf War,<sup>76</sup> which were designed expressly to harm innocent civilians, Israel's raid on Osiraq was conceived for the *protection* of civilians.

Since the establishment of the State of Israel in 1948, Iraq has been openly committed to destroying the Jewish State. Baghdad

---

70. See KAREL C. WELLENS ED., RESOLUTIONS AND STATEMENTS OF THE UNITED NATIONS SECURITY COUNCIL 351-52 (1990). This Resolution was adopted unanimously.

71. For authoritative positions supporting the particular reasonableness of anticipatory self-defense in the nuclear age, see LOUIS HENKIN ET. AL., INTERNATIONAL LAW: CASES AND MATERIALS 933 (1980) (citing WOLFGANG FRIEDMANN, THE THREAT OF TOTAL DESTRUCTION AND SELF-DEFENSE 259-60 (1964); JOSEPH M. SWEENEY ET. AL., THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 1460-61 (3rd ed. 1988) (citing Myres McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 598 (1963).

72. This is the term used generally for Israel in the Arab World.

73. Crimes Against Peace are defined in the *Charter of the International Military Tribunal*, Aug. 8, 1945, art. 6, 59 Stat. 1546, 1547, 82 U.N.T.S. 279.

74. See Beres & Tsiddon-Chatto, *supra* note 69.

75. *Id.*

76. On Friday, Jan. 18, 1991, eight Scud missiles were fired at Tel-Aviv by Saddam Hussein's government in Baghdad. This attack was followed by the firing of thirty-one additional Scuds, directed exclusively at civilian populations in Israel. Iraq's last missile attack against Israel took place on February 25, 1991. For an authoritative assessment of the Scud toll from the 39 missile attacks, see *SCUD Toll: Summing Up the 39 Missile Attacks*, JERUSALEM POST (Int'l Edition), Mar. 9, 1991, at 3. See also by this author, *Prosecuting Iraqi Gulf War Crimes: Allied and Israeli Rights Under International Law*, 16 HASTINGS INT'L & COMP. L. REV. 41 (1992).

joined several other Arab states attacking Israel on the very day of its declared independence.<sup>77</sup> But while Egypt,<sup>78</sup> Lebanon, Jordan, and Syria proceeded to sign armistice agreements with Israel in 1949,<sup>79</sup> Iraq always steadfastly insisted upon a permanent state of belligerency.<sup>80</sup>

All things considered, Israel's defensive strike against an enemy state preparing for extermination warfare was distinctly law-enforcing. In the absence of a centralized enforcement capability, international law must rely upon the willingness of individual states to act on behalf of the entire global community.<sup>81</sup> This is exactly what took place on June 7, 1981, when, with surgical precision, Jerusalem's fighter-bombers precluded an Iraqi nuclear option.<sup>82</sup>

---

77. Iraq also sent expeditionary forces during the Six Day War (1967) and the Yom Kippur War (1973). During the 1948 War, Baghdad's forces entered TransJordan and engaged Israeli forces in Western Samaria. After the 1967 War, Iraqi forces, then deployed in Jordan, remained there for more than two years. During the 1973 War, Baghdad committed about one-third of its then 95,000 man armed forces to assist Syria in its campaign against the IDF on the Golan.

78. Egypt and Jordan have now both entered into formal treaties of peace with Israel. Regarding Egypt, however, contrary to widespread belief, its treaty does not constrain Cairo from joining with other Arab states against the Jewish State. A minute to Article VI, paragraph 5, of the Israel-Egypt Peace Treaty provides that it is agreed to by the parties that there is no assertion that the Peace Treaty prevails over other treaties or agreements, or that other treaties or agreements prevail over the Peace Treaty. See TREATY OF PEACE, Egypt-Israel, Mar. 26, 1979, Minute to Art. VI (5), 18 I.L.M. 362, 392.

79. These general armistice agreements were negotiated bilaterally between Israel and Egypt: Armistice Agreement, Feb. 24, 1949, Israel-Egypt, 42 U.N.T.S. 251-70; Israel and Lebanon, Armistice Agreement, Mar. 23, 1949, Israel-Lebanon, 42 U.N.T.S. 287-98; Israel and Jordan, Armistice Agreement, Apr. 3, 1949, Israel-Jordan, 42 U.N.T.S. 303-20; Israel and Syria, Armistice Agreement, July 10, 1949, Israel-Syria, 42 U.N.T.S. 327-40. Under international law, a general armistice is a *war convention*, an agreement or contract concluded *between belligerents*. Such an agreement does not result in the termination of a state of war. The 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, stipulates, at the Annex to the Convention, that "an armistice suspends military operations by mutual agreement between the belligerent parties." Convention No. IV of The Hague Respecting the Laws and Customs of War on Land, 36 Stat. 2277 (Oct. 18, 1907).

80. This is manifest even today with Iraq's explicit commitment to remain outside the Middle East Peace process.

81. This conclusion is necessarily implied by the premises; i.e., it is the inevitable deduction from the structural context of world law.

82. See Statement by former Secretary of Defense Richard Cheney on Oct. 28, 1991, in AVI BEKER, DENUCLEARIZATION WITHOUT GLASNOST 161-62 (1993).

## VII. Conclusion

"In the end," says the poet Goethe, "we depend upon creatures of our own making."<sup>83</sup> Understood in terms of Israel's security options vis-à-vis Iran, the poet's wisdom suggests a willingness to consider all strategic options, including life-saving, and ultimately law-enforcing, forms of preemption. Aware that the Jewish State remains embedded in "protracted conflict,"<sup>84</sup> and that little hope can be expected from the vaunted peace process, Jerusalem must be prepared to look everywhere, all at once. In the fashion of Janus,<sup>85</sup> a god of another ancient enemy, Israel must now look in all directions simultaneously, poised always for diplomatic options, but prepared also to strike first, lawfully, in essential self-defense.

---

83. From an aphorism by the great German poet.

84. The idea of Israel as a state embedded in "protracted conflict" is hardly new. Yitzhak Rabin coined the term "dormant war" in the 1960s to describe Israel's situation when not engaged in active hostilities. Amnon Rubinstein, the leader of the centrist Shinui Party, wrote: "It is Israel's *fate* to live in a hostile world that refuses to accept her and to see her as part of the Middle East reality." Moshe Arens, a Likud leader and former defense minister, regarded the Middle East as a region where war was endemic. For Ariel Sharon, a long-term enduring peace for Israel was "nothing but a dream." Similarly, Yuval Neeman, the leader of the Tehiya Party, regarded Middle East wars as a product of historical conditions similar to those that had existed in Europe for hundreds of years. Neeman and other, therefore, were arguing that Israel must reconcile itself to a situation of protracted or unending war, at least for the foreseeable future. On these views, see Efraim Inbar, *Attitudes Toward War in the Israeli Political Elite*, 44 MIDDLE E.J. 431-45 (1990).

85. Janus was the ancient Roman god of doors and gates; hence, of all *beginnings*. His symbol is the double-faced head, Janus is usually represented with two heads placed back-to-back so that he might look in two directions simultaneously.